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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONNELL DUPREE FULCHER, Defendant and Appellant.	D055291 (Super. Ct. No. SCD204965)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

Following a mistrial, a second jury convicted Donnell Dupree Fulcher of second degree murder of Roberto Rodriguez (Pen. Code,[1] § 187, subd. (a); count 1) and assault with a firearm (§245, subd. (a)(2); count 2). He admitted the truth of his prior strike conviction.

1 All statutory references are to the Penal Code unless otherwise specified.

The court sentenced him to 40 years to life on count 1 as follows: 15 years for murder; plus 25 years for a firearm enhancement (§ 12022.53, subd. (d)); and on count 2, it imposed a concurrent 16-year determinate term.

He contends the trial court erred in: (1) denying his motion to suppress evidence seized pursuant to the initial search warrant because it did not state probable cause for issuance of the warrant; (2) excluding from evidence the contents of his telephone conversation with a witness the night of the murder, and (3) permitting a supervising officer to testify he had approved Fulcher's arrest. He further contends the cumulative errors required reversal of the judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At issue in this appeal is a warrant issued authorizing the search of Fulcher's residence. The warrant was based on San Diego Police Department Detective George Alldredge's affidavit, which we summarize as follows:

Roberto Rodriguez and his girlfriend, Matilda Onofre, were sitting in a parked car in San Diego, when someone shot them with a 12-gauge shotgun, killing Rodriguez. The medical examiner determined the manner of death was homicide.

Onofre told police that she and Rodriguez were parked outside Chueys restaurant, Rodriguez left the car, walked a short distance and returned, saying he smelled marijuana. Onofre noticed that someone was in a "black, red or dark car" that was parked two spaces over. She described the driver of the vehicle as a Black male, approximately 24 years old and approximately 6 feet tall, and somewhat skinny, who wore a dark beanie and a dark

jacket. The suspect approached Rodriguez, had a short conversation about smoking marijuana, pulled out a gun and started firing at Rodriguez and his car.

Police subsequently discovered Rodriguez was carrying apparent burglary tools. When they presented Onofre with that information, she stated Rodriguez had flashed his flashlight into nearby vehicles, and he also might have tried to open their doors, including the suspect's vehicle. Police believed Rodriguez's car prowls provided the motive for the homicide.

Police located a baseball cap, expended shotgun shell casings, and a glove in the parking space where the suspect's vehicle had been parked that night. A swab of the interior of the glove produced a DNA match for Fulcher as a major contributor, with a female a likely minor contributor.[2] Fulcher is an ex-felon convicted in 1993 for assault with a deadly weapon. Police determined the glove was a type used by glass installers. Police conducted surveillance of Fulcher's residence, saw him arrive home and determined he matched Onofre's description of the suspect. In a discussion with him, Police learned his business was called Any Time Glass and Mirror.

Police learned that approximately eight days before the murder, Fulcher's parked vehicle was stolen approximately two blocks from the murder scene. Police used Fulcher's 2001 photograph in a line-up, but Onofre did not identify him. However, to the police, Fulcher matched Onofre's initial description of the suspect's race, height, weight, and distinctly shaped nose.

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[2] The affidavit stated that the match was made between DNA obtained from inside the glove and a sample in the California Department of Justice DNA database.

Detective Alldredge explained Onofre's errors were related to the stress resulting from the traumatizing shooting incident: "I have experienced similar misidentifications on other investigations during my police career, specifically from witnesses that are both victims and witnesses."

The search warrant sought from Fulcher's residence the following non-exhaustive list of items: "firearms, including any capable of discharging a 12-gauge shotgun shell, ammunition, casings, cleaning equipment, owner manuals, holsters and/or rifle-shotgun slings designed to carry a long firearm concealed, clothing or other objects bearing blood or bloodstains, human hair, tissues, secretions and parts thereof; dark color beanie type watch-caps, dark color jackets with lapel buttons, white tee shirts, dark color pants, and left-hand light blue and white cotton/rubber glove, or other gloves similar in make."

A judge approved the search warrant, and pursuant to it police searched Fulcher's residence, retrieving among other things, a pair of gloves that was similar to the glove found at the crime scene, a black beanie cap, and another beanie cap, a box of .22-caliber long rifle bullets, a magazine with .22-caliber bullets, a gun case, and a holster. They also seized an underwear and a toothbrush, which they intended to use to obtain a female's DNA. Based on the materials seized and further police investigation, including an interview with Fulcher, police applied for and obtained search warrants for Fulcher's phone records and other materials, including Fulcher's girlfriend's car.

Fulcher moved under section 1538.5 to suppress evidence obtained pursuant to the initial warrant, arguing the affidavit "contains the merest hint that [he] could be connected to the crime: his DNA on a glove at the scene, a public street near where he

had his car stolen a week before. However, the victim witness excludes him as a suspect," and evidence obtained pursuant to other warrants was fruit of the poisonous tree.

The People countered that after the murder, police found a glove used by glass workers near the exact spot where the suspect's vehicle was parked during the incident. Fulcher is a glass worker, whose car had been stolen a week before the murder from the same parking area. His DNA matched that found in the glove and therefore the " 'common sense inference' is that the fresh glove with the defendant's DNA at the murder scene connects the defendant to the crime as well as the fact that the defendant had a motive to shot [*sic*] the victims because he was angry that his car was stolen and might have believe [*sic*] the victim either stole his car or should simply be punished for being a car thieve [*sic*]."

The court denied the motion as to evidence relating to Fulcher, finding probable cause existed for the issuance of the first search warrant and the subsequent warrants; however, it suppressed the underwear and toothbrush related to a possible female suspect.

DISCUSSION

I.

Fulcher contends, "The circumstances described in the affidavit did not sufficiently connect [him] or his residence to the homicide investigation. Indeed, no specific facts linked him to the shooting. He was not identified in a photographic lineup by [Onofre] and his vehicles did not match the description of the suspect's car."

Probable cause exists for a search warrant when there is a fair probability that contraband or evidence of a crime will be found in the place to be searched. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239.) The issuing magistrate need only make "a practical, common-sense decision . . . , given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information . . . ." (*Ibid*.) The probable cause standard is a " 'practical, nontechnical conception' " that focuses on probabilities that exist under a particular set of facts. (*Id*. at p. 231.) Probable cause describes reasons to be suspicious, not a prima facie case of guilt. (*People v. Thuss* (2003) 107 Cal.App.4th 221, 236.) "Probable cause, unlike the fact itself, may be shown by evidence that would not be competent at trial. [Citation.] Accordingly, information and belief alone may support the issuance of search warrants, which require probable cause." (*Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573.)

In a particular case it may be difficult to determine when an affidavit demonstrates the existence of probable cause; the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants. (*People v. Weiss* (1999) 20 Cal.4th 1073, 1082-1083.) A court reviewing the issuance of a search warrant defers to the magistrate's finding of probable cause unless the warrant is invalid as a matter of law. (See *People v. Thuss*, *supra*, 107 Cal.App.4th at p. 235.)

Based on the totality of the circumstances, we conclude the affidavit provided "a substantial basis to support a strong suspicion that there was evidence of a crime" to be found at Fulcher's house. (*People v. Stanley* (1999) 72 Cal.App.4th 1547, 1555.)

Onofre's description of the suspect matched Fulcher. The glove found at the crime scene matched gloves used by workers in the glass industry, and police learned that Fulcher worked in that industry. DNA taken from the glove matched Fulcher's DNA. The detective's theory that Rodriguez cased the vehicle of the suspect, who was motivated to murder because barely one week previously his vehicle was stolen in the same parking area where the murder occurred was reasonable under the circumstances, and further linked Fulcher to the crime. Accordingly, it was reasonably probable that Fulcher would keep the materials sought in the warrant at his residence.

Contrary to Fulcher's claim, Onofre's misidentification of another individual for the suspect did not eliminate probable cause, which separately existed to execute the search warrant. Detective Alldredge had explained in his affidavit that, based on his experience, misidentification was not uncommon, particularly because the victim was traumatized by being at the same time a victim of the attack and a witness to it. In this case, Onofre also lost her boyfriend in the incident.

Although even doubtful or marginal cases should be resolved in the law's preference for warrants (*People v. Superior Court* (*Corona*) (1981) 30 Cal.3d 193, 203), this was not a doubtful or marginal case, and the judge did not err in issuing the search warrant. Hence the trial court did not err in denying the motion to suppress.

II.

The People moved in limine to exclude trial testimony from Willie Aldridge, who had testified in the first trial that Fulcher had called him the night of the murder asking Aldridge to "meet [him] at Tina's." The People argued, "The fact that [Fulcher] called

obviously comes in, but not where he was, not where he wanted you to meet." Based on a transcript of Fulcher's jailhouse call to Aldridge regarding the night of the murder, the prosecutor argued that Fulcher had planted in Aldridge's mind the idea that they had agreed to meet at Tina's. Specifically, the prosecutor stated that in the phone call, Fulcher commented something like, "Well, I don't know where I was . . . but my girl Heather . . . thinks that was the night we hooked up at Tina's." The prosecutor noted, "And Mr. Aldridge does not say . . . anything about that. But the defendant planted that idea in his mind so that when he came and testified [in the first trial] he was ready to say, [']Oh, yeah, that's when [Fulcher] told me to meet him at Tina's.['] And counsel asked him about, [']well, where Tina's [*sic*]?['] And all these questions — this area was mostly stricken in the last trial, but the bell was rung." The prosecutor noted that the detective had asked Aldridge during the investigation whether he remembered Fulcher's telephone call, and Aldridge responded he had "no idea;" nevertheless, Aldridge testified at the first trial "with absolute clarity" regarding the telephone conversation.

Fulcher argued Aldridge's statement was admissible, and it was offered to show Fulcher's state of mind "because if he has an intent on being at Tina's, that shows that he's not at Chuey's [restaurant, near where the victim was murdered.]"

The court agreed with the prosecutor and ruled, "It's hearsay. And I think it's offered without any exception I can come up with." It prohibited Aldridge from referring to the phone conversation with Fulcher regarding meeting at Tina's. The court added a further basis for its ruling: "I also consider the fact that there was this jail communication

[the prosecutor had referred to] triggering it. So for all those reasons, hearsay, and plus that potential programming, I'm not allowing it."

On appeal, Fulcher contends his comment to Aldridge that they meet at Tina's was not hearsay, but assuming it was, it was admissible for the non-hearsay purpose of proving his conduct in conformity with his state of mind under Evidence Code section 1250.

"The trial court is vested with broad discretion in determining the admissibility of evidence. [Citation.] This is particularly true where, as here, underlying that determination are questions of relevancy, the state of mind exception to the hearsay rule and undue prejudice. [Citation.] The lower court's determination will be reversed only upon a finding of abuse." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 386.)

"Hearsay evidence," defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated," is generally inadmissible. (Evid. Code, § 1200.) Evidence offered under the state of mind exception to the hearsay rule is inadmissible " 'if the statement was made under circumstances such as to indicate its lack of trustworthiness.' " (Evid. Code, § 1252.) "The United States Constitution compels the admission of hearsay evidence only if the proponent shows the evidence is highly relevant to a critical issue and is sufficiently reliable." (*People v. Smith* (2003) 30 Cal.4th 581, 629.)

Here, the trial court found Fulcher's statement to Aldridge was hearsay because it was made outside of trial and offered to prove the truth of the matter asserted. Although Fulcher argued the state of mind exception applied, the court reasonably found Fulcher's

statements to Aldridge were untrustworthy based on Aldridge's unresponsiveness when Fulcher was attempting to recall the events from the night of the murder; Aldridge's prior statement to the detectives that he had no idea what he and Fulcher discussed in the phone conversation; and, the prospect that Fulcher was planting a suggestion regarding that night's events in Aldridge's mind. The court acted within its discretion in excluding the challenged portion of Aldridge's testimony. (*People v. Edwards* (1991) 54 Cal.3d 787, 820.)

III.

San Diego Police Sergeant Brian Pendleton supervised a team of four detectives who investigated Fulcher's involvement in the charged homicide. Fulcher, relying on *United States v. Cunningham* (7th Cir. 2006) 462 F.3d 708 (*Cunningham*), contends Pendleton improperly conveyed a personal opinion as to his guilt based on the below trial testimony.

"[Prosecutor]: And [Fulcher's] arrest, were the facts leading to his arrest ran by you?

"[Sergeant Pendleton]: Yes.

"[Prosecutor]: And then you approved the defendant's arrest?

"[Sergeant Pendleton]: Yes.

"[Defense Attorney]: Objection to relevance, your honor, [Evidence Code, section] 352.

"The Court]: I will allow just a little bit more. Go ahead.

"[Prosecutor]: Thank you. I have no further . . . questions at this time."

Fulcher contends, "Not only did [Pendleton] testify that he had approved the arrest, he noted that it was based upon facts relayed to him regarding the investigation, thereby suggesting that he had special knowledge of the defendant's guilt."

Fulcher's reliance on *Cunningham* is misplaced. The *Cunningham* court provided this overview of the issue in that case: "Over the defendant's objection at trial, the government recounted a litany of procedures of the local U.S. Attorney's office, the Office of the Attorney General, and the Drug Enforcement Administration . . . utilized in seeking court authorization for two telephone wiretaps. In doing so, the government witness's testimony suggested to the jury that a panel of senior government lawyers in the Office of the Attorney General in Washington, D.C. and others in law enforcement were of the opinion that there was probable cause to believe the defendants were indeed engaging in criminal activity. The admission of this irrelevant evidence had the effect of improperly bolstering the credibility of the government's case in the eyes of the jury, and the error was not harmless." (*Cunningham, supra,* 462 F.3d 708 at pp. 709-710.)

Other portions of Officer Pendleton's testimony, which Fulcher did not object to at trial or on this appeal, would have imparted to the jury the fuller context for the officer's testimony regarding his approval of Fulcher's arrest. Specifically, this exchange took place at trial:

"[Prosecutor]: As a supervisor of a homicide team throughout their investigation are officers required to write down reports, generate police reports?

"[Sergeant Pendleton]: Yes.

"[Prosecutor]: And as a sergeant are you required to authorize or approve those reports?

"[Sergeant Pendleton]: Every report on the case should be approved, but in my absence could be approved by any supervisor."

Separately, Officer Pendleton testified as follows regarding a crime scene diagram prepared by one of his subordinates:

"[Prosecutor]: And what we see in front of us has a line that says 'approved by.' And that is blank.

"[Sergeant Pendleton]: Yes.

"[¶] . . . [¶]

"[Prosecutor]: Who's [*sic*] signature would that be?

"[Sergeant Pendleton]: On the final copy, mine.

"[Prosecutor]: So you're responsible for approving Detective Ramirez's reports?

[Sergeant Pendleton]: Yes."

In contrast to *Cunningham*, Officer Pendleton was the sole supervisor who testified regarding his approval of Fulcher's arrest. The portion of his testimony objected to was the specific question of whether he had authorized the arrest, and he did not testify to a "litany of procedures" relating to approving the arrest. Contrary to Fulcher's claim, Sergeant Pendleton's statement did not indicate he believed Fulcher was guilty. Rather, from the context of his testimony, his authorization of the arrest was a routine part of his job as supervisor, and his testimony merely established that foundational fact.

IV.

Fulcher contends we should reverse his convictions based on cumulative errors. We reject this contention. A series of trial errors, though harmless when considered independently, may in some circumstances rise by accretion to the level of prejudicial, reversible error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) A defendant is entitled to a fair trial, but not a perfect one. (*Ibid*.) We concluded there was no error. Fulcher has failed to meet his burden of showing the requisite series of trial errors and thus has failed to show any cumulative errors or prejudice. He has not shown he was denied a fair trial. (Accord, *People v. Geier* (2007) 41 Cal.4th 555, 620 ["However, as defendant 'has demonstrated few errors, and we have already found such errors or possible errors harmless, either individually or cumulatively, "we likewise conclude that their cumulative effect does not warrant reversal of the judgment." ' "]

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

I CONCUR:

HUFFMAN, Acting P. J.

I CONCUR IN THE RESULT:

McDONALD, J.